

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LUCKY L. MEYER,

Plaintiff,

v.

DAVE GRAZIANI, et al.,

Defendants.

No. C 03-05583 CW

ORDER GRANTING
DEFENDANTS'
MOTION TO DISMISS
AND GRANTING IN
PART PLAINTIFF'S
REQUEST TO AMEND

Plaintiff Lucky Meyer brings suit for unlawful discrimination and retaliation under the Rehabilitation Act, 29 U.S.C. § 701 et seq. and the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA) and for violation of constitutional rights under 42 U.S.C. § 1983. Defendants move to dismiss Plaintiff's first amended complaint (FAC) and, in the alternative, request a more definite statement. Plaintiff opposes this motion and, in the alternative, requests leave to amend. Plaintiff has also appealed the magistrate judge's order denying her discovery requests in this matter and has requested a stay in the disposition of this motion. These matters have been submitted on the papers. Having considered all of the papers filed by the parties, the Court GRANTS Defendants' motion to dismiss, GRANTS in part Plaintiff's request for leave to amend, DENIES Plaintiff's request for stay and DENIES Plaintiff's appeal of the denial of discovery.

BACKGROUND

I. Procedural History

Plaintiff was hired by Napa State Hospital (NSH) on July 1, 1999 as a psychiatric technician. On October 10, 2002, Plaintiff was transferred to a warehouse run by NSH. On April 15, 2003, she was placed on involuntary disability leave. On May 15, 2003, Plaintiff was released to return to work by her doctor but was not reinstated. On June 25, 2003, Plaintiff filed a claim with the Equal Employment Opportunity Commission (EEOC) alleging discrimination based upon race, sex, age, and disability. On August 29, 2003, the EEOC sent Plaintiff a letter entitled "Dismissal and Notice of Rights" (right-to-sue letter) indicating that the EEOC had been unable to substantiate the alleged discrimination and that Plaintiff had ninety days within which to file suit to preserve her claims.

On December 11, 2003, Plaintiff filed suit against NSH only, alleging employment discrimination based on her race and gender under Title VII of the Civil Rights Act of 1964. On February 24, 2004, NSH moved to dismiss on statute of limitations grounds. On April 20, 2004, Plaintiff submitted a request for leave to amend as of right which was granted by the Court on April 23, 2004. On June 15, 2004, the Court denied NSH's first motion to dismiss on statute of limitations grounds.¹ On October 20, 2004, Plaintiff filed her FAC, alleging claims under the Rehabilitation Act and the ADA, and

¹ As explained in that order, Plaintiff's complaint was received by the Clerk's office on November 25, 2003, within the ninety day statute of limitations period, but was not filed until December 11, 2003.

1 constitutional claims under 42 U.S.C. § 1983. On June 10, 2005,
2 Defendants filed the motion to dismiss now before the Court.

3 II. Factual History

4 Although, in her original complaint, Plaintiff alleged
5 violations of Title VII based on race and gender discrimination and
6 named NSH as the sole defendant, in the body of her complaint
7 Plaintiff also alleged discrimination by the "management staff" and
8 the "management program," as well as misconduct by unidentified
9 "E.D. personnel." Comp. at 1-3. Plaintiff submitted, with her
10 complaint, her claim filed with the California Department of Fair
11 Employment and Housing (DFEH) and a right-to-sue letter from the
12 DFEH. In the DFEH claim, Plaintiff alleged that "personnel"
13 informed her that she would be terminated if she "did not go on
14 involuntary disability or disability retirement."

15 In her FAC, Plaintiff names eleven individuals as Defendants:
16 1) David Graziani, executive director of NSH, 2) Jeffrey Zwerin,
17 medical director of NSH, 3) Michael Stolp, program director of NSH
18 Program One, 4) Dean Percy, NSH personnel director, 5) Cheryl
19 Smith, a recreational therapist with NSH Program One, 6) Peggy
20 Spence, nursing coordinator of NSH Program One, 7) Eric Khoury, an
21 NSH staff psychiatrist, 8) Jatinder Singh, an NSH staff
22 psychologist, 9) Sandy Sanut, the unit supervisor for NSH ward T-8,
23 10) Elaine Moulton², an NSH human resources employee, and
24 11) Charles Schaffer, a contract psychiatrist employed by NSH

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26 ² Plaintiff named "Elaine Moulton" as a defendant.
27 Defendants' counsel indicates that the correct surname is
28 "Moulton." The Court will refer to this Defendant as "Moulton."

(collectively, Individual Defendants). Plaintiff sues each Individual Defendant "individually in their official capacity." FAC at 3:8-12. Plaintiff specifically alleges that she is "unsure of exactly what capacity to use to sue the defendants, considering the facts as will be alleged." FAC at 3:5. The Court liberally construes Plaintiff's FAC to allege all claims against Individual Defendants in both their official and individual capacities.³ Although Plaintiff does not name NSH in the caption of her FAC, she alleges elsewhere in the FAC that she brings suit "against NSH." Id. Plaintiff neither refers to the right-to-sue letter nor attaches the letter to the FAC.

In the FAC, as noted above, Plaintiff sues, not for race or gender discrimination under Title VII, but for violations of the Rehabilitation Act, the ADA, and her constitutional rights to free speech, due process and equal protection, under 42 U.S.C. § 1983.⁴ The essence of the factual allegations of the FAC is that Individual Defendants discriminated and retaliated against Plaintiff because of her arthritis and her use of sick leave due to her arthritis, and they retaliated against her because she complained about NSH staff's abuse and neglect of patients and

³ A suit against a State official in his or her "official capacity" is a suit against the office itself and triggers liability of the State. Hafer v. Melo, 502 U.S. 21, 25-26 (1991). A suit against a State official in his or her "individual capacity" is a suit against the person and triggers direct liability on the part of that individual. Id.

⁴ Because Plaintiff does not allege Title VII claims in the FAC, they are no longer part of this case.

1 violations of NSH policies and procedures.⁵

2 Plaintiff alleges that adverse employment actions, such as her
3 transfer to the NSH warehouse and her ultimate termination, were
4 taken against her by her supervisors at NSH. Plaintiff also
5 alleges that she was subjected to a hostile work environment by NSH
6 staff through a pattern of unfair discipline, repeated reassignment
7 within the hospital, verbal harassment, humiliation and
8 intimidation.

9 DISCUSSION

10 I. Legal Standard

11 A motion to dismiss for failure to state a claim will be
12 denied unless it is "clear that no relief could be granted under
13 any set of facts that could be proved consistent with the
14 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th
15 Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514
16 (2002). All material allegations in the complaint will be taken as
17 true and construed in the light most favorable to the plaintiff.
18 NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). A
19 complaint must contain a "short and plain statement of the claim
20 showing that the pleader is entitled to relief." Fed. R. Civ. P.
21 8(a). "Each averment of a pleading shall be simple, concise, and
22 direct. No technical forms of pleading or motions are required."
23 Fed. R. Civ. P. 8(e). These rules "do not require a claimant to

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25 ⁵ Plaintiff alleges that she was terminated "because there is
26 an unwritten . . . policy to harass and terminate anyone from
27 employment, anyone who goes 'against the grain,' and complains
28 about rule violations by other staff, or complains about the
patients being abused or neglected." FAC at 14:23-26.

1 set out in detail the facts upon which he bases his claim. To the
2 contrary, all the Rules require is 'a short and plain statement of
3 the claim' that will give the defendant fair notice of what the
4 plaintiff's claim is and the grounds on which it rests." Conley v.
5 Gibson, 355 U.S. 41, 47 (1957).

6 When granting a motion to dismiss, a court is generally
7 required to grant a plaintiff leave to amend, even if no request to
8 amend the pleading was made, unless amendment would be futile.
9 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911
10 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment
11 would be futile, a court examines whether the complaint could be
12 amended to cure the defect requiring dismissal "without
13 contradicting any of the allegations of [the] original complaint."
14 Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).
15 Leave to amend should be liberally granted, but an amended
16 complaint cannot allege facts inconsistent with the challenged
17 pleading. Id. at 296-97. A pro se plaintiff's complaint will be
18 liberally construed. Haines v. Kerner, 404 U.S. 519, 521 (1972);
19 King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

20 II. Section 1983 Claims

21 Defendants move to dismiss Plaintiff's section 1983 claims
22 based on the statute of limitations and Eleventh Amendment
23 immunity.

24 A. Statute of Limitations

25 Plaintiff's original complaint, filed on December 11, 2003,
26 contained no allegations of constitutional violations under 42
27 U.S.C. § 1983 and in the caption of the complaint, Plaintiff named
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1 NSH as the sole defendant in her suit. In the FAC filed on October
2 20, 2004, Plaintiff alleges section 1983 claims against Individual
3 Defendants based on violations of her constitutional rights to due
4 process, equal protection and free speech. As noted above,
5 Plaintiff's claims were based on allegations of discrete adverse
6 actions against her as well as of a hostile work environment.

7 The EEOC documents attached to Plaintiff's original complaint
8 alleged adverse actions taken by NSH on or about August, 2002
9 through December, 2002. The section 1983 claims against Individual
10 Defendants were filed on October 20, 2004. Assuming that the
11 adverse actions described in the EEOC complaint are the basis for
12 Plaintiff's section 1983 claims, Individual Defendants contend that
13 the section 1983 claims were not filed within the applicable one-
14 year statute of limitations.

15 1. The Applicable Statute of Limitations

16 Section 1983 claims are governed by California's statute of
17 limitations for personal injury claims. Wilson v. Garcia, 471 U.S.
18 261, 276 (1985) (forum State's statute of limitations for personal
19 injury claims applies to section 1983 claims). Until January 1,
20 2003, the applicable statute of limitations for section 1983 claims
21 was one year under California Civil Procedure Code section 340(3).
22 McMillan v. Goleta Water Dist., 792 F.2d 1453, 1456 (9th Cir. 1986)
23 (citing Wilson, 471 U.S. at 279 and Cal. Civ. P. Code § 340(3)).

24 Effective January 1, 2003, the California statute of
25 limitations for assault, battery, and other personal injury claims
26 was changed to two years. Cal. Civ. Proc. Code § 335.1.
27 Individual Defendants contend that the statute of limitations in
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1 this case is governed by California Civil Procedure Code section
2 340(3), the statute of limitations which applied to personal
3 injuries before the enactment of section 335.1. They are
4 incorrect.

5 Although a section 1983 action filed in California today
6 clearly would be governed by California's new two-year statute of
7 limitations for personal injury actions, this circuit and
8 California courts have held that the new statute of limitations
9 does not apply retroactively to expired claims. Maldonado v.
10 Harris, 370 F.3d 945, 955 (9th Cir. 2004) (two-year statute of
11 limitations did not apply to claim which had expired several months
12 before enactment of section 335.1); Krupnick v. Duke Energy Morro
13 Bay, 115 Cal. App. 4th 1026, 1028 (2004) (two-year statute of
14 limitations did not apply retroactively to claims already barred).
15 However, a recent California appellate decision clarified that
16 claims which were not already barred by the original limitations
17 period at the time section 335.1 went into effect are governed by
18 the new statute. Andonaqui v. May Dept. Stores Co., 128 Cal. App.
19 4th 435, 441 (2005). Because Plaintiff's claims were not time-
20 barred when section 335.1 went into effect on January 1, 2003, the
21 two-year statute of limitations governs this case.

22 2. Acts Triggering of the Statute of Limitations

23 The statute of limitations on section 1983 claims begins to
24 run "when a plaintiff knows or has reason to know of the injury
25 which is the basis of the action." Bagley v. CMC Real Estate
26 Corp., 923 F.2d 758, 760 (9th Cir. 1991). When an injury occurs
27 for purposes of the statute of limitations depends on the nature of
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1 the alleged injury.

2 a. Discrete Retaliatory Acts

3 Discrete retaliatory acts begin the statutory clock the day
4 they happen. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101,
5 110 (2002) (Title VII); RK Ventures, Inc. v. City of Seattle, 307
6 F.3d 1045, 1061 (9th Cir. 2002) (applying Morgan analysis to
7 section 1983 actions). Although Plaintiff does not provide dates
8 in her FAC, according to her EEOC complaint, she was reassigned to
9 the NSH warehouse on December 10, 2002 and placed on involuntary
10 disability on April 15, 2003. Thus, her October 20, 2004
11 complaint, which alleges that several Individual Defendants
12 "combined and arranged" these discrete retaliatory actions, is
13 timely.

14 b. Hostile Work Environment

15 Plaintiff appears to allege that, in response to her exercise
16 of protected speech, Individual Defendants not only took discrete
17 actions against her but also created a hostile work environment.
18 See Allen v. Scribner, 812 F.2d 426, 434 n.17 (9th Cir. 1987)
19 ("entire campaign of harassment which though trivial in detail may
20 have been substantial in gross" sufficient to state a claim under
21 the First Amendment). Plaintiff alleged retaliatory injury in the
22 form of the denial of assignments, perpetual reassignment within
23 the hospital, intimidation and unfair discipline.

24 With respect to "hostile work environment" claims:

25 It does not matter . . . that some of the component acts
26 of the hostile work environment fall outside the
27 statutory time period. Provided that an act contributing
28 to the claim occurs within the filing period, the entire
time period of the hostile environment may be considered

1 by a court for the purposes of determining liability.
2 Morgan, 536 U.S. at 117. Hostile work environment claims do not
3 begin at any discrete point in time because "[t]heir very nature
4 involves repeated conduct." Id. at 115. Because Plaintiff filed
5 the FAC on October 20, 2004 and because the applicable statute of
6 limitations is two years, if any act contributing to the hostile
7 work environment claim occurred on or after October 20, 2002, the
8 claim is timely.

9 Even if Plaintiff's claim were barred by the statute of
10 limitations, equitable tolling might apply. As with the statute of
11 limitations, this Court must apply the rules for equitable tolling
12 from the forum State, California. Hardin v. Straub, 490 U.S. 536,
13 539, 544 (1989); Cervantes v. City of San Diego, 5 F.3d 1273, 1275
14 (9th Cir. 1993). Under California law, equitable tolling
15 "reliev[es] a plaintiff from the bar of a limitations statute when,
16 possessing several legal remedies he, reasonably and in good faith,
17 pursues one designed to lessen the extent of his injuries or
18 damage." Addison v. California, 21 Cal. 3d 313, 317 (1978).
19 Equitable tolling is not appropriately resolved on a motion to
20 dismiss unless it is absolutely plain from the face of the
21 complaint that the plaintiff could prove no set of facts that could
22 entitle him or her to the benefit of that doctrine. Cervantes, 5
23 F.3d at 1276.

24 As evidenced by her EEOC documentation, Plaintiff has spent
25 time pursuing administrative remedies with the EEOC. Although she
26 was pursuing remedies for discrimination based on disability, as
27 long as two claims are predicated upon the same wrong, plaintiffs
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1 will be entitled to equitable tolling for time spent pursuing each
2 claim, if they satisfy California's three-pronged equitable tolling
3 test. Lucchesi v. Bar-O Boys Ranch 353 F.3d 691, 696 (9th Cir.
4 2003). Plaintiff's pursuit of administrative relief for her
5 disability discrimination claim may equitably toll her section 1983
6 claim. Therefore, it is not clear from the face of the pleadings
7 that Plaintiff is not entitled to the benefit of equitable tolling.
8 If, in the future, Defendants wish to move for summary judgment on
9 statute of limitations grounds, they must address the issue of
10 equitable tolling.

11 B. Properly Named Defendants

12 1. NSH Is Not a Person under Section 1983

13 NSH is an agency of the State of California and thus cannot be
14 named as a defendant in a section 1983 suit. Section 1983 provides
15 that "[e]very person who, under color of any statute . . .
16 subjects, or causes to be subjected, any citizen of the United
17 States . . . to the deprivation of any rights, privileges, or
18 immunities secured by the Constitution and laws, shall be liable to
19 the party injured in an action at law." The Supreme Court has
20 found that a State is not a "person" within the meaning of section
21 1983. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71
22 (1989). Agencies such as NSH, which are run by the State, are
23 likewise not "persons" within the meaning of section 1983. Taylor
24 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Any section 1983
25 claim against NSH is therefore dismissed with prejudice.

2. Individual Defendants Cannot Be Sued in Their
Official Capacities for Damages under Section 1983.

Because suits for damages against individuals in their official capacity are impermissible under section 1983, Plaintiff's section 1983 damages claims against Individual Defendants in their official capacities must be dismissed. Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. Hafer v. Melo, 502 U.S. 21, 25 (1991). Suits against State officials in their official capacity therefore should be treated as suits against the State. Id. Section 1983 does not allow suits against individual State employees in their official capacity. Will, 491 U.S. at 71. Therefore, Plaintiff's § 1983 damages claims against Individual Defendants in their official capacity are hereby dismissed with prejudice. However, Plaintiff's section 1983 official capacity claim for injunctive relief may proceed against Graziani under the Ex parte Young doctrine. Hale v. Arizona 993 F.2d 1387, 1399 (9th Cir. 1993) (Section 1983 claim for injunctive relief may proceed against State official in his official capacity). Because Graziani is the only party necessary to provide injunctive relief, the § 1983 claims for injunctive relief against the remaining Individual Defendants are dismissed with prejudice.

Section 1983 allows suits against State officials in their "individual capacities" as "persons" within the meaning of the statute. Hafer, 502 U.S. at 31. Section 1983 claims can be made against Individual Defendants in their individual capacities.

1 C. Plaintiff Must Amend to State a Claim Under Section 1983

2 1. Legal Standard

3 Section 1983 "provides a cause of action for the 'deprivation
4 of any rights, privileges, or immunities secured by the
5 Constitution and laws' of the United States." Wilder v. Virginia
6 Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
7 Section 1983 is not itself a source of substantive rights, but
8 merely provides a method for vindicating federal rights elsewhere
9 conferred. Graham v. Connor, 490 U.S. 386, 393-94 (1989). To
10 state a claim under section 1983, a plaintiff must allege two
11 essential elements: (1) that a right secured by the Constitution or
12 laws of the United States was violated and (2) that the alleged
13 violation was committed by a person acting under the color of State
14 law. West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda
15 County, 811 F.2d 1243, 1245 (9th Cir. 1987).

16 Liability may be imposed on an individual defendant under
17 section 1983 if the plaintiff can show that the defendant
18 proximately caused the deprivation of a federally protected right.
19 Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City
20 of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person
21 deprives another of a constitutional right within the meaning of
22 section 1983 if he or she does an affirmative act, participates in
23 another's affirmative act or omits to perform an act which he or
24 she is legally required to do, that causes the deprivation of which
25 the plaintiff complains. Leer, 844 F.2d at 633; Robins v. Meecham,
26 60 F.3d 1436, 1442 (9th Cir. 1995) (prison official's failure to
27 intervene to prevent Eighth Amendment violation may be basis for
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1 liability). To be held liable for failure to intervene,
2 individuals must have had a "realistic opportunity" to intercede to
3 prevent the constitutional injury. Cunningham v. Gates, 229 F.3d
4 1271, 1289-90 (9th Cir. 2000) (police officer without realistic
5 opportunity to prevent excessive force by fellow officer not
6 liable).

7 The inquiry into causation must be individualized and focus on
8 the duties and responsibilities of each individual defendant whose
9 acts or omissions are alleged to have caused a constitutional
10 deprivation. Leer, 844 F.2d at 633. To demonstrate causation in a
11 retaliation claim based upon the exercise of free speech, a
12 plaintiff must show "that his constitutionally protected expression
13 was a substantial or motivating factor in the employer's adverse
14 decision or conduct." Allen, 812 F.2d at 433. A plaintiff
15 alleging denial of equal protection under 42 U.S.C. § 1983 based on
16 race or other suspect classification must plead intentional
17 unlawful discrimination or allege facts that are at least
18 susceptible of an inference of discriminatory intent. Monteiro v.
19 Tempe Union High School Dist., 158 F.3d 1022, 1026 (9th Cir. 1998).
20 To state a claim for relief, the plaintiff must allege that the
21 defendant State actor acted at least in part because of the
22 plaintiff's membership in a protected class. Serrano v. Francis,
23 345 F.3d 1071, 1081-82 (9th Cir. 2003). The Due Process Clause of
24 the Fourteenth Amendment protects individuals against governmental
25 deprivations of "life, liberty or property" without due process of
26 law. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972);
27 Mullins v. Oregon, 57 F.3d 789, 795 (9th Cir. 1995). Procedural
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1 due process analysis involves two steps. First, a plaintiff must
2 show that the government has deprived him or her of life, liberty
3 or property. Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).
4 Second, the plaintiff must show that the government deprived him or
5 her of these constitutionally-protected interests without due
6 process of law. Id.

7 2. Alleged Acts and Omissions of Individual Defendants

8 Plaintiff alleges that Khoury, Stolp, Smith, Spence, Singh,
9 Sanut and Moulton subjected her to retaliation. Alone, these
10 conclusory allegations are insufficient to withstand a motion to
11 dismiss. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir.
12 1982). Although Plaintiff provides specific allegations with
13 respect to each named defendant regarding his or her participation
14 in depriving Plaintiff of her constitutional rights, she fails to
15 state a claim against any Individual Defendant.

16 Plaintiff alleges that Khoury was a staff psychiatrist at NSH
17 who, on more than one occasion, yelled at Plaintiff in front of
18 patients and fellow NSH employees. Khoury allegedly "combined and
19 arranged" Plaintiff's continual transfer within NSH wards and her
20 ultimate transfer to the NSH warehouse, both of which were
21 considered a demotion. FAC at 6:8. Plaintiff alleges that
22 Khoury's conduct occurred after Plaintiff complained about Khoury's
23 violations of NSH health and safety rules. Plaintiff does not
24 allege that Khoury knew of Plaintiff's complaints nor does she
25 allege that Khoury took any adverse action against her because of
26 her membership in a protected class or without due process of law.

27 Plaintiff alleges that Stolp, who is responsible for
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1 overseeing the activities of all Program One employees, improperly
2 "combined and arranged" Plaintiff's continual transfer within NSH
3 wards and her ultimate transfer to the NSH warehouse. FAC at 6:27.
4 Plaintiff alleges that this conduct occurred after Plaintiff
5 complained about Khoury's violations of NSH health and safety
6 rules, but does not allege that Stolp knew about her complaints or
7 took any act against Plaintiff with the intent to discriminate
8 against her on the basis of her membership in a protected class or
9 without due process of law.

10 Plaintiff alleges that Percy was the NSH personnel officer and
11 personally handled her case. She alleges that Percy "combined and
12 arranged" Plaintiff's continual transfer within NSH wards and her
13 ultimate transfer to the NSH warehouse and was one of two
14 individuals who informed her that she must take involuntary
15 disability or be terminated. FAC at 7:27. Plaintiff further
16 alleges a verbal confrontation between Percy and herself in which
17 he snapped at her, stating, "I'm tired of you and I'm tired of it
18 all," and forcefully directed Plaintiff to "get out." She alleges
19 that he was present during a discussion between Moulton, Spence and
20 NSH police regarding Plaintiff's unfitness for duty. FAC at 7:16-
21 23. However, she does not allege that Percy knew about her
22 complaints or that he took any adverse action against Plaintiff on
23 the basis of her membership in a protected class or without due
24 process of law.

25 Plaintiff alleges that Smith untruthfully reported to Spence
26 that Plaintiff assaulted her. Plaintiff also alleges an incident
27 of intimidation in which Smith stood very close to her, followed
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1 her, and ignored Plaintiff's request that Smith move further away.
2 Again, however, Plaintiff does not allege that Smith knew about her
3 complaints or that Smith took any adverse action against her on the
4 basis of her membership in a protected class or without due process
5 of law.

6 Plaintiff alleges that Spence "combined and arranged"
7 Plaintiff's continual transfer within NSH wards and her ultimate
8 transfer to the NSH warehouse. FAC at 8:23. Plaintiff
9 particularly alleges an intimidating verbal altercation between
10 Spence and Plaintiff in which Spence accused Plaintiff of
11 manipulating her shifts at the hospital and which concluded with
12 Spence stating that, "if I find out you are causing problems, you
13 will find out that I will do something about it!" FAC at 9:3-4.
14 Plaintiff fails to allege that Spence knew about her complaints or
15 that Spence took any adverse action against her on the basis of her
16 membership in a protected class or due process of law.

17 Plaintiff alleges that Singh "combined and arranged"
18 Plaintiff's continual transfer within NSH wards and her ultimate
19 transfer to the NSH warehouse. FAC at 10:4. Plaintiff further
20 alleges that Singh untruthfully accused Plaintiff of misconduct and
21 of having an affair with a client. Plaintiff also alleges that
22 Singh "supported" Khoury's actions against Plaintiff. FAC at
23 10:13. However, Plaintiff does not allege that Singh knew about
24 her complaints or that Singh took any adverse action against her on
25 the basis of her membership in a protected class or without due
26 process of law.

27 Plaintiff alleges that Sanut "combined . . and arranged" her
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1 continual transfer within NSH wards and her ultimate transfer to
2 the NSH warehouse. FAC at 10:17. She also alleges that Sanut
3 yelled and cursed at her in front of a patient and then spoke with
4 one of her supervisors and untruthfully accused her of cursing that
5 patient. However, she does not allege that Sanut knew about her
6 complaints or that Sanut took any adverse action against her on the
7 basis of her membership in a protected class or without due process
8 of law.

9 Plaintiff alleges that Moulton, who worked in the Office of
10 Human Resources at NSH, "combined and arranged" Plaintiff's
11 continual transfer within NSH wards and her ultimate transfer to
12 the NSH warehouse. FAC at 10:17. Plaintiff alleges that Moulton
13 was one of two individuals who instructed Plaintiff that she must
14 take involuntary disability or be terminated. Plaintiff also
15 alleges that Moulton discussed with Spence and NSH police
16 Plaintiff's unfitness for duty and dangerousness and threatened to
17 have Plaintiff arrested if she returned to NSH facilities.
18 However, Plaintiff does not allege that Moulton knew about her
19 complaints or that Moulton took any adverse action against her on
20 the basis of her membership in a protected class or without due
21 process of law.

22 Plaintiff alleges that Schaffer, a contract psychiatrist,
23 falsely diagnosed Plaintiff as too dangerous to continue working at
24 NSH "in order to circumvent . . . the unlawful and unethical
25 actions of NSH." FAC at 11:21-22. Plaintiff alleges that by
26 providing this false diagnosis and later withholding the report
27 from Plaintiff, Schaffer was "doing the bidding" of NSH. FAC at
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1 12:11-12. However, Plaintiff does not allege that Schaffer knew
2 about her complaints or that Schaffer took any adverse action
3 against her on the basis of her membership in a protected class or
4 without due process of law.

5 Plaintiff alleges that Graziani, as executive director of NSH,
6 is legally and ultimately responsible for the creation,
7 implementation, monitoring, review, and enforcement of all rules
8 and regulations governing NSH employees. Plaintiff further alleges
9 that Graziani had "personal knowledge of [Plaintiff's] case" and
10 failed to perform an adequate investigation of the misconduct of
11 his employees. FAC at 5:6-10. However, Plaintiff fails to allege
12 that Graziani knew about her complaints or that he took any adverse
13 action against her on the basis of her membership in a protected
14 class or without due process of law.

15 Plaintiff alleges that Zwerin, as medical director of NSH, is
16 legally responsible for the supervision of the psychiatrists and
17 medical doctors at NSH. Plaintiff further alleges that Zwerin had
18 "personal knowledge of [Plaintiff's] case" and failed to perform an
19 adequate investigation of the misconduct of staff psychiatrists
20 alleged elsewhere in the complaint. FAC at 5:16-18. However,
21 Plaintiff fails to allege that Zwerin knew about her complaints or
22 that Zwerin took any adverse action against her on the basis of her
23 membership in a protected class or without due process of law.

24 In sum, the FAC details individual events including verbal
25 threats, physical intimidation, false accusations, unjust
26 discipline, perpetual reassignments, false diagnosis and
27 Plaintiff's ultimate termination performed by Khoury, Stolp, Percy,
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1 Smith, Spence, Singh, Sanut, Moulton, and Schaffer individually or
2 in combination. Leer, 844 F.2d at 633. These cognizable injuries
3 could support a First Amendment retaliation claim if they were
4 caused by Plaintiff's exercise of free speech rights. Allen, 812
5 F.2d at 433. The alleged actions could support an Equal Protection
6 claim if they were motivated by each Defendant's intent to
7 discriminate against Plaintiff on the basis of her membership in a
8 protected class. The alleged actions could support a due process
9 claim if they deprived Plaintiff of a protected property interest
10 without due process of law.

11 However, Plaintiff has failed to allege facts from which could
12 be drawn the inference of individualized causation necessary to
13 state a section 1983 claim. In order for Plaintiff's injuries to
14 implicate the First Amendment, each Individual Defendant must have
15 acted out of a desire to retaliate against Plaintiff for speaking
16 on an issue of public concern, i.e. the abuse of patients at NSH.
17 However, the FAC fails to indicate to whom Plaintiff addressed any
18 of her complaints about the abuse of patients at NSH, or when. Nor
19 does the FAC allege that any Individual Defendant knew or could be
20 reasonably expected to have known about Plaintiff's complaints
21 concerning the abuse of patients or that any Individual Defendant
22 committed any of the individual actions listed in the FAC because
23 of such knowledge.

24 Therefore, Plaintiff's section 1983 claims against the
25 Individual Defendants based on First Amendment violations are
26 dismissed with leave to amend. If Plaintiff can amend her
27 complaint to assert truthfully facts from which it could be
28

1 inferred that Khoury, Stolp, Percy, Smith, Spence, Singh, Sanut,
2 Moulton, and Schaffer 1) knew of her complaints about the abuse of
3 patients at NSH and 2) thereafter took individual retaliatory
4 actions because of this knowledge, she may state a First Amendment
5 claim for damages under section 1983 against these Individual
6 Defendants.

7 Furthermore, Plaintiff fails to allege any facts that would
8 raise an inference of discriminatory intent on the part of any
9 Individual Defendant. Therefore, Plaintiff's section 1983 claims
10 against the Individual Defendants based on Equal Protection
11 violations are dismissed with leave to amend for Plaintiff to add
12 such allegations, if she truthfully can do so.

13 Plaintiff also alleges inadequate investigation by Graziani
14 and Zwerin of the workplace abuses committed by the aforementioned
15 Individual Defendants. Graziani and Zwerin are allegedly
16 responsible for monitoring the behavior of NSH employees. As noted
17 above, failure to intervene to prevent a constitutional injury can
18 support a section 1983 claim. Leer, 844 F.2d at 633. However, in
19 order to be held liable for a failure to intervene, an individual
20 must have had a "realistic opportunity" to prevent the
21 constitutional injury. Cunningham, 229 F.3d at 1289. Graziani and
22 Zwerin could not have had such an opportunity unless they knew of
23 Plaintiff's constitutional injuries while they were ongoing, a fact
24 which Plaintiff has not alleged. If Plaintiff can amend her
25 complaint to assert truthfully that Graziani and Zwerin knew
26 1) that Plaintiff engaged in protected speech, 2) that adverse
27 employment actions were taken against her because of her protected
28

1 speech, or 3) that adverse employment actions were taken against
2 her because of her membership in a protected class, she may state a
3 First Amendment or Equal Protection claim against Graziani and
4 Zwerin under section 1983.

5 In regard to Plaintiff's due process claim, she may have a
6 property interest in continued employment. See Skelly v. State
7 Personnel Bd., 15 Cal. 3d 194, 206-07 (1975) (California's
8 statutory scheme regulating civil service employment creates
9 property interest if employee has achieved permanent employee
10 status). If Plaintiff has such a property interest, she may not be
11 dismissed or subjected to other disciplinary measures without a
12 hearing. Id. at 207. Plaintiff must allege that she has such a
13 property interest and specify which Defendant or Defendants
14 terminated her employment or subjected her to disciplinary measures
15 without providing for a hearing prior to taking such actions.
16 Therefore, Plaintiff's due process claim is dismissed with leave to
17 amend for Plaintiff to add allegations that would remedy these
18 deficiencies, if she truthfully can do so.

19 D. Summary of Section 1983 Claims

20 Any section 1983 claim against NSH, the damages claims against
21 Individual Defendants in their official capacities, and all section
22 1983 injunctive relief claims against Individual Defendants in
23 their official capacities, except those against Graziani, are
24 dismissed without leave to amend. The section 1983 damages claims
25 against Individual Defendants in their individual capacities and
26 the official capacity claim for injunctive relief against Graziani
27 are dismissed with leave to amend.

1 III. ADA Claim

2 A. Nature of the ADA Claim

3 The essence of Plaintiff's ADA claim is that Individual
4 Defendants discriminated and retaliated against her because she had
5 arthritis and took sick leave due to arthritis.

6 Title I of the ADA prohibits a "covered entity" from
7 discriminating against a "qualified individual with a disability"
8 on the basis of that individual's disability. 42 U.S.C.
9 § 12112(a). As defined by section 12112(b)(5)(B), discrimination
10 includes "denying employment opportunities to a job applicant or
11 employee who is an otherwise qualified individual with a
12 disability, if such denial is based on the need of such covered
13 entity to make reasonable accommodation to the physical or mental
14 impairments of the employee or applicant."

15 Although Plaintiff need not support each element of her Title
16 I discrimination claim at this stage in the case, Swierkiewicz, 534
17 U.S. at 508, the elements of such a claim are as follows. To
18 establish that her termination constituted discrimination under
19 Title I, a plaintiff must prove that (1) she is disabled; (2) she
20 is qualified to perform the essential functions of the job, either
21 with or without accommodation; and (3) she was terminated because
22 of her disability. Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d
23 1080, 1095-96 (9th Cir. 2001).⁶

24 Title V prohibits retaliation against individuals seeking to
25

26 ⁶ The Court does not decide whether Plaintiff's arthritis is a
27 qualifying disability within the meaning of the ADA; the
28 determination of this issue is inappropriate at this stage in the
proceedings. Swierkiewicz, 534 U.S. at 508.

1 enforce the statutory provisions of the ADA. 42 U.S.C. § 12203(a).
2 To succeed in a retaliation claim a plaintiff must show
3 "(1) involvement in an activity protected under the ADA, (2) an
4 adverse employment action and (3) a causal link between the two."
5 Coons v. Sec'y of United States Dept. of Treasury, 383 F.3d 879,
6 887 (9th Cir. 2004).

7 B. Exhaustion of Administrative Remedies

8 Defendants argue that any ADA claims are barred because
9 Plaintiff has failed to plead exhaustion of remedies or to attach
10 to the FAC any evidence of exhaustion. To bring a claim under
11 Title I of the ADA, a plaintiff must exhaust administrative
12 remedies by filing a formal complaint with the EEOC and filing suit
13 within ninety days of receipt of a right-to-sue letter. Santa
14 Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000).

15 Defendants rely upon the Ninth Circuit's statement that
16 "substantial compliance with the presentment of discrimination
17 complaints to an appropriate administrative agency is a
18 jurisdictional prerequisite." Sommatino v. United States, 255 F.3d
19 704, 708 (9th Cir. 2001) (emphasis omitted). The jurisdictional
20 prerequisite to which the Sommatino court refers, however, is not
21 the pleading of exhaustion of administrative remedies in the
22 complaint but the filing of a formal EEOC complaint. See id. ("In
23 cases where a plaintiff has never presented a discrimination
24 complaint to the appropriate administrative authority, we have held
25 that the district court does not have subject matter
26 jurisdiction.")

27 Here, Plaintiff's formal EEOC complaint and right-to-sue
28

1 letter, referring to discrimination based on disability, were
2 attached to her original complaint. Therefore, it appears that
3 Plaintiff has complied with the exhaustion requirements necessary
4 to secure the jurisdiction of this Court with regard to her
5 disability discrimination claims. Plaintiff is directed to attach
6 her EEOC documentation to her second amended complaint.

7 However, Plaintiff has not exhausted her ADA retaliation
8 claims. Exhaustion extends only to claims that fall "within the
9 scope of the EEOC's actual investigation or an EEOC investigation
10 that could reasonably be expected to grow out of the charge."
11 B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1099 (9th Cir. 2002).
12 When the legal theory of unlawful retaliation and the operative
13 facts regarding a retaliation claim are not related to the facts in
14 the EEOC charge, a plaintiff has not exhausted a retaliation claim.
15 Vasquez v. County of Los Angeles, 349 F.3d 634, 645 (9th Cir.
16 2003). The box on Plaintiff's EEOC complaint referring to
17 retaliation was not checked and the EEOC complaint does not refer
18 to Plaintiff engaging in a protected activity as required for a
19 retaliation claim. Retaliation is beyond the scope of reasonable
20 EEOC investigation of Plaintiff's claims, so Plaintiff has not
21 exhausted her ADA retaliation claim. Because exhaustion of
22 remedies is a jurisdictional requirement, Sommatino, 255 F.3d at
23 708, this claim is therefore dismissed.

24 The Court also notes that Plaintiff failed to name Individual
25 Defendants in her EEOC complaint. Charges of discrimination can be
26 brought against persons not named in an EEOC complaint "as long as
27 they were involved in the acts giving rise to the E.E.O.C. claims."
28

1 EEOC v. National Educ. Ass'n, Alaska, 422 F.3d 840, 847 (9th Cir.
 2 2005). Plaintiff's EEOC complaint does not specify the acts of
 3 harassment by Individual Defendants upon which she now bases her
 4 claims against them. However, because, as discussed below,
 5 Plaintiff cannot bring ADA claims against individuals, the Court
 6 need not address whether Plaintiff's EEOC complaint exhausted the
 7 claims against Individual Defendants.⁷

8 C. Claims Against the Individual Defendants

9 Individual Defendants move to dismiss Plaintiff's ADA claim on
 10 the ground that individuals cannot be sued under the ADA.

11 1. Discrimination Claims under Title I Against Individual 12 Defendants as Individuals

13 Title I of the ADA prohibits employment discrimination against
 14 a "qualified individual with a disability" by a "covered entity"
 15 such as an "employer." 42 U.S.C. §§ 12111(2), 12112(a). The ADA
 16 defines an "employer" as "a person engaged in an industry affecting
 17 commerce who has fifteen or more employees . . . and any agent of
 18 such person" 42 U.S.C. § 12111(5)(A). This definition
 19 mirrors the definitions of employer in Title VII, 42 U.S.C.
 20 § 2000e(b), and in the Age Discrimination in Employment Act (ADEA),
 21 29 U.S.C. § 630. The Ninth Circuit has repeatedly noted that

22 ⁷ Defendants contend for the first time in their reply brief,
 23 without providing supporting argument, that the statute of
 24 limitations has expired for Plaintiff's ADA and Rehabilitation Act
 25 claims. However, like section 1983 claims, claims under the ADA
 26 and the Rehabilitation Act are typically governed by State statutes
 27 of limitations for personal injury. See Baker v. Board of Regents
 28 of State of Kan., 991 F.2d 628, 632 (10th Cir. 1993) (analogizing
 Rehabilitation Act claims to personal injury claims). To the
 extent that the statute of limitations is relevant to the ADA and
 Rehabilitation Act claims, the statute of limitations analysis
 applicable to Plaintiff's section 1983 claims applies here.

1 analogy to Title VII helps to define the scope of parallel
2 provisions of the ADA. Hernandez v. Hughes Missile Sys. Co., 362
3 F.3d 564, 568 (9th Cir. 2004) (drawing on Title VII precedent to
4 set out plaintiff's burden in ADA case); Snead, 237 F.3d at 1093
5 (holding that Title VII analysis applies in ADA case); Head v.
6 Glacier Northwest Inc., 413 F.3d 1053, 1064-65 (9th Cir. 2005)
7 (holding Title VII causation standard is applicable under the ADA).
8 Individual employees cannot be held personally liable for damages
9 under Title VII or the ADEA. Miller v. Maxwell's Int'l, Inc., 991
10 F.2d 583, 587-88 (9th Cir. 1993).

11 The Ninth Circuit has not decided the issue of individual
12 liability under the ADA. Eason v. Clark County Sch. Dist., 303
13 F.3d 1137, 1145 (9th Cir. 2002). However, other circuits, and
14 district courts in the Ninth Circuit, have held, by analogy to
15 Title VII and the ADEA, that individuals do not qualify as
16 "employers" under Title I of the ADA and are not subject to
17 personal liability for acts of disability discrimination. See,
18 e.g., Mason v. Stallings, 82 F.3d 1007, 1009 (11th Cir. 1996); EEOC
19 v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir.
20 1995); Stern v. California State Archives, 982 F. Supp. 690, 692
21 (E.D. Cal. 1997); Gallo v. Bd. of Regents of the Univ. of
22 California, 916 F. Supp. 1005, 1009 (S.D. Cal. 1995). The Court
23 finds the reasoning of these courts persuasive and holds that
24 individuals may not be held personally liable under Title I of the
25 ADA for acts of disability discrimination. Therefore, Plaintiff's
26 Title I claims against Individual Defendants in their individual
27 capacities are dismissed.

2. Discrimination Claims under Title I Against Individual Defendants in Their Official Capacities

Plaintiff also brings suit under the ADA against Individual Defendants in their official capacities, both for money damages and for injunctive relief.

a. Monetary Damages

Claims for damages against Individual Defendants in their official capacities, which would require payment by the State treasury, implicate the State's sovereign immunity under the Eleventh Amendment. The Eleventh Amendment bars from the federal courts suits for damages against a State by its own citizens, citizens of another State or citizens or subjects of any foreign State. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 n.2 (1985); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Edelman v. Jordan, 415 U.S. 651, 676-77 (1974). Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, a State cannot be sued for monetary damages. See Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985) (citing Pugh, 438 U.S. at 781); Confederated Tribes & Bands v. Locke, 176 F.3d 467, 469 (9th Cir. 1999).

In Board of Trustees of the University of Alabama v. Garrett, the Supreme Court held that in Title I of the ADA Congress did not validly abrogate the States' Eleventh Amendment immunity. 531 U.S. 356, 360 (1999). After Garrett, it is clear that States are immune from suits for money damages under Title I of the ADA. Douglas v. California Dept. of Youth Auth., 271 F.3d 812, 821 (9th Cir. 2001). Therefore, Plaintiff's claims against Individual Defendants in

1 their official capacities for compensatory and punitive damages are
2 dismissed with prejudice. Any ADA claim for monetary damages
3 against NSH is also barred by the Eleventh Amendment. Therefore,
4 all of Plaintiff's damages claims under the ADA are dismissed.

5 b. Injunctive Relief

6 i. Reinstatement

7 Plaintiff requests that this Court "require the defendants to
8 take such actions as will ensure [that] lawful and fair conditions
9 of employment are afforded to me" FAC at 16:30-17:1. The
10 Court construes this prayer as a request for the prospective
11 injunctive relief of reinstatement.

12 Under the Ex parte Young doctrine, a suit for prospective
13 injunctive relief provides a narrow exception to Eleventh Amendment
14 immunity. See Ex parte Young, 209 U.S. 123, 159-60 (1908); Doe v.
15 Lawrence Livermore Nat'l Lab., 131 F.3d 836, 839 (9th Cir. 1997).
16 In Garrett, the Court explicitly stated that suits for injunctive
17 relief under Title I can be brought against individuals in their
18 official capacities under the Ex parte Young doctrine. 531 U.S. at
19 374 n.9. Therefore, Plaintiff can properly bring a claim under the
20 ADA to recover her position at NSH. However, this claim need not
21 be addressed to each Individual Defendant, but only to the official
22 responsible for hiring employees at NSH. Because Plaintiff alleges
23 that Graziani, in his capacity as executive director of NSH, is
24 ultimately responsible for all employment decisions at NSH,
25 Graziani is the only defendant necessary to secure injunctive
26 relief. The injunctive relief claims against other Individual
27 Defendants are dismissed without leave to amend.

1 ii. Fair Conditions for Fellow Employees

2 Plaintiff also requests that the Court "require the defendants
3 to take such actions as will ensure [that] lawful and fair
4 conditions of employment are afforded to . . . employees of Napa
5 State Hospital." FAC at 16:30-17:2. Except to the extent that
6 this request embodies Plaintiff's request for her own
7 reinstatement, Plaintiff lacks standing to bring such a claim.

8 "[T]hose who seek to invoke the jurisdiction of the federal
9 courts must satisfy the threshold requirement imposed by Article
10 III of the Constitution by alleging an actual case or controversy."
11 City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983). In order to
12 establish the existence of such a case or controversy, a plaintiff
13 must demonstrate standing: that he or she has suffered an injury in
14 fact, that the injury was caused by the defendant's conduct, and
15 that the injury is capable of being redressed by a favorable court
16 ruling. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
17 (1992) (reciting the requirements for standing). When a plaintiff
18 requests injunctive relief, this constitutional mandate requires
19 that the plaintiff face a threat of present or future harm. Lyons,
20 461 U.S. at 101-03. Because Defendants' treatment of other NSH
21 employees does not injure Plaintiff, Plaintiff lacks standing to
22 bring this claim and it must be dismissed.

23 D. Plaintiff Must Amend Her Complaint to State a Claim for
24 Injunctive Relief under the ADA against Graziani

25 Plaintiff fails to state a claim under the ADA. Plaintiff
26 alleges that

27 I was subjected to some discrimination . . . and
28 harassment, as a result of my having the debilitating and

1 disabling condition of arthritis. I was given a hard
2 time because I chose to utilize my employee 90 "free"
3 days leave to rest and somewhat recuperate from the
4 problems I have from arthritis . . .

5 FAC at 4:15-18.

6 Plaintiff's ADA claims fail to allege either that 1) NSH
7 employees knew of Plaintiff's arthritic condition, or 2) any of the
8 specific adverse actions allegedly taken by NSH employees against
9 Plaintiff was performed to discriminate against her because of her
10 disability. Plaintiff's allegation that she was "given a hard
11 time" because of her use of sick leave does not support a
12 disability discrimination claim unless adverse action directed
13 towards Plaintiff was motivated by her disability. If Plaintiff
14 can amend her complaint to assert truthfully facts from which it
15 could be inferred that NSH employees 1) knew of Plaintiff's
16 arthritis and 2) took adverse actions against Plaintiff because of
17 this knowledge, she may state a claim for injunctive relief against
18 Graziani.

19 E. Summary of ADA Claims

20 In summary, all ADA claims except the claim for injunctive
21 relief against Graziani in his official capacity based on
22 discrimination against Plaintiff are dismissed without leave to
23 amend. The official capacity claim against Graziani for injunctive
24 relief based on discrimination is dismissed with leave to amend.

25 IV. Rehabilitation Act Claims

26 The Rehabilitation Act is substantially identical to the ADA,
27 except that it is limited to programs that receive federal
28 financial assistance, Armstrong v. Davis, 275 F.3d 849, 862 n.17

(9th Cir. 2001), and requires a plaintiff to prove discrimination "solely by reason of his or her disability." 29 U.S.C. § 794(a). The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the ADA. Coons, 383 F.3d at 884 (citing 29 U.S.C. § 794(d)).

A. Exhaustion of Administrative Remedies

Defendants argue that Plaintiff's claims under the Rehabilitation Act must be dismissed because she failed to exhaust administrative remedies. However, exhaustion of administrative remedies is not required for Rehabilitation Act claims. Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990). Therefore, Defendants' argument for dismissal on this ground fails.

B. Claims Against Individual Defendants

Individual Defendants move to dismiss Plaintiff's discrimination and retaliation claims under the Rehabilitation Act on the ground that they are not proper defendants.

1. Discrimination Claims

Section 504 of the Rehabilitation Act of 1972 prohibits discrimination against employees on the basis of disability by any "program or activity" which receives federal funding. 29 U.S.C. § 794(a). Because Individual Defendants are not a "program or activity" as defined in section 794(a) they cannot be sued in their individual capacities for discrimination under this section.

2. Retaliation Claims

The Ninth Circuit has not yet ruled on whether individuals may be held liable for retaliation claims under the ADA or the Rehabilitation Act. Several courts, addressing retaliation claims

1 in employment under the ADA, have decided that individuals may not
2 be held liable. See e.g., Baird v. Rose, 192 F.3d 462, 471-72 (4th
3 Cir. 1999); Hiler v. Brown, 177 F.3d 542, 545-46 (6th Cir. 1999);
4 Van Hulle v. Pacific Telesis Corp., 124 F. Supp. 2d 642, 646 (N.D.
5 Cal. 2000) Stern v. California State Archives, 982 F. Supp. 690,
6 692-93 (E.D. Cal. 1997). To this Court's knowledge, only one court
7 has held the opposite. See Ostrach v. Regents of the Univ. of
8 Cal., 957 F. Supp. 196, 200 (E.D. Cal. 1997). The Court could find
9 no rulings addressing retaliation in employment under the
10 Rehabilitation Act. However, without deciding whether individuals
11 can be liable for retaliation, the Court finds that Plaintiff has
12 failed to state a claim of retaliation under the Rehabilitation
13 Act.⁸

14 As noted above, a claim of retaliation requires a plaintiff to
15 show a causal link between involvement in a "protected activity"
16 and an adverse employment action. Coons, 383 F.3d at 887. A
17 causal link requires a showing that the defendant knew of the
18 protected activity, or that the temporal proximity between the
19 protected activity and the adverse action was "very close." Clark
20 County School Dist. v. Breeden, 532 U.S. 268, 273-74 (2001) (per
21 curiam). Protesting the actions of supervisors for their alleged
22 violation of a discrimination law is a protected activity, as is
23 making such informal complaints to a supervisor. Trent v. Valley
24 Electric Ass'n Inc., 41 F.3d 524, 526 (9th Cir. 1994); Ray v.

25
26 ⁸The Court did not address the merits of Plaintiff's
27 retaliation claim under the ADA because it was dismissed for
28 failure to exhaust administrative remedies.

1 Henderson, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000).

2 Plaintiff fails to allege, nor can the Court infer, any
3 activity in which she engaged that was protected under the
4 Rehabilitation Act. Plaintiff alleges that she complained about
5 the abuse of patients at NSH. However, the abuse of patients is
6 not forbidden under the Rehabilitation Act, which prohibits only
7 disability discrimination. Plaintiff also alleges that she was
8 "given a hard time" because of her use of sick leave. It does not
9 appear that use of sick leave is "protected activity" under the
10 Rehabilitation Act. Therefore, Plaintiff's Rehabilitation Act
11 retaliation claim is dismissed. If Plaintiff can truthfully allege
12 a causal connection between her participation in an activity
13 protected by the Rehabilitation Act and an adverse employment
14 action, she may include this claim against specific Individual
15 Defendants in her second amended complaint.

16 C. Discrimination and Retaliation Claims against NSH

17 Under the Rehabilitation Act, sovereign immunity is not
18 implicated because the State of California has unambiguously waived
19 its Eleventh Amendment immunity by receiving Rehabilitation Act
20 funds. Douglas, 271 F.3d at 820; see also Phiffer v. Columbia
21 River Corr. Inst., 384 F.3d 791, 793 (9th Cir. 2004) (affirming
22 continued validity of Douglas holding). Therefore, Plaintiff may
23 assert Rehabilitation Act claims for injunctive relief and for
24 damages against NSH based on discrimination and retaliation.
25 Plaintiff's ability to sue NSH directly renders unnecessary claims
26 against Individual Defendants in their official capacity. Soffer
27 v. City of Costa Mesa, 798 F.2d 361, 363 (9th Cir. 1986). The
28

1 Rehabilitation Act claims against the Individual Defendants in
2 their official capacities are dismissed without leave to amend, but
3 Plaintiff may bring a Rehabilitation Act claim for injunctive
4 relief and damages against NSH in her second amended complaint.

5 Although, under the Rehabilitation Act, Plaintiff may sue NSH,
6 the allegations in the FAC are insufficient to state a claim
7 against it. The standards for liability under the ADA and
8 Rehabilitation Act are the same. Armstrong, 275 F.3d at 862 n.17.
9 Therefore, for the reasons discussed above in regard to the ADA
10 claims, Plaintiff must amend her complaint to state a claim under
11 the Rehabilitation Act. Plaintiff's Rehabilitation Act claim based
12 on discrimination and retaliation is dismissed with leave to amend.

13 D. Summary of Rehabilitation Act Claims

14 All Rehabilitation Act discrimination claims against
15 Individual Defendants are dismissed without leave to amend. The
16 Rehabilitation Act damages claims for retaliation against
17 Individual Defendants are dismissed with leave to amend to state a
18 claim. The Rehabilitation Act discrimination and retaliation
19 claims against NSH for damages and for injunctive relief are
20 dismissed with leave to amend to state a claim.

21 V. Plaintiff's Motion to Appeal Denial of Discovery

22 On August 1, 2005, Plaintiff submitted an appeal of Magistrate
23 Judge Laporte's order, entered July 7, 2005, denying Plaintiff's
24 motion for reconsideration and denying without prejudice
25 Plaintiff's motion to compel. Under Rule 72(a) of the Federal
26 Rules of Civil Procedure, a party must file objections to a
27 magistrate judge's order on a non-dispositive motion within ten
28

1 days of the order. Because Plaintiff has failed to meet this
2 deadline, Plaintiff's request to appeal the denial of discovery is
3 denied.

4 CONCLUSION

5 For the reasons stated above, Defendants' motion to dismiss
6 (Docket No. 63) is GRANTED. Plaintiff's request for leave to amend
7 is GRANTED in part. The following claims are dismissed without
8 leave to amend: 1) all section 1983 claims against Individual
9 Defendants in their official capacities except the claim for
10 injunctive relief against Graziani, 2) any section 1983 claim
11 against NSH, 3) all ADA claims against Individual Defendants in
12 their individual capacities, 4) all ADA claims against Individual
13 Defendants in their official capacities except the claim for
14 injunctive relief against Graziani for discrimination, 5) any ADA
15 claim against NSH, 6) all Rehabilitation Act claims for
16 discrimination against Individual Defendants in their individual
17 capacities, and 7) all Rehabilitation Act claims against Individual
18 Defendants in their official capacities. The following claims are
19 dismissed with leave to amend in accordance with this order: 1) the
20 section 1983 damages claims against Individual Defendants in their
21 individual capacities, 2) the section 1983 claims against Graziani
22 for injunctive relief, 3) the ADA discrimination claim against
23 Graziani in his official capacity for injunctive relief, 4) the
24 Rehabilitation Act discrimination claim against NSH for damages and
25 injunctive relief, and 5) the Rehabilitation Act retaliation
26 claims against Individual Defendants and NSH for damages. Because
27 leave to amend has been granted, Plaintiff's request for stay
28

(Docket No. 82) is DENIED as moot. If Plaintiff chooses to file a Second Amended Complaint (SAC) remedying the deficiencies noted in this Order, she must do so within two weeks from the date of this Order. Defendants' response will be due twenty days thereafter. The case management conference that has been set for March 10, 2006 at 10:00 a.m. is VACATED. If Defendants file a motion to dismiss the SAC, they shall notice it for April 28, 2006 at 10:00 a.m. A case management conference will be held on the same date. If Plaintiff fails to file a timely SAC, the case will be dismissed with prejudice for failure to prosecute.

IT IS SO ORDERED.

Dated: 2/15/06



CLAUDIA WILKEN
United States District Judge

Copies mailed to counsel
as noted on the following page